

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

DAVID ARMSTRONG,  
Plaintiff,  
v.  
THE CITY OF SAN JOSE, et al.,  
Defendants.

Case No. [5:16-cv-02938-EJD](#)

**ORDER DENYING DEFENDANTS'  
MOTION TO DISMISS**

Re: Dkt. Nos. 15, 15-1

Plaintiff David Armstrong brings this action against the City of San Jose and several of its police officers for civil rights violations under 42 U.S.C. § 1983. Before the Court is Defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(6). Defendants' motion will be DENIED.

**I. BACKGROUND**

Armstrong runs MediMarts, a medical cannabis collective in San Jose (the "City"). Complaint ("Compl.") ¶ 11, Dkt. No. 1. In 2010, the City enacted a sales tax on medical cannabis, which Armstrong refused to pay. Id. ¶ 12–14. In 2014, the City sued Armstrong and MediMarts for nonpayment. Id. ¶ 15. Armstrong cross-complained for constitutional violations and later brought a separate suit challenging the tax's validity.<sup>1</sup> Id. When asked about Armstrong's challenge, the City's mayor commented that his message to Armstrong was: "Pack up. It's time to move on—and pay up on your way out." Id. ¶ 16.

---

<sup>1</sup> Under Fed. R. Evid. 201, the Court GRANTS the City's Request for Judicial Notice, Dkt. No. 15-1, comprising papers filed in Armstrong's other litigation against the City (Exs. 1–3) and excerpts of the San Jose City Charter (Ex. 4).

1       On March 9, 2015, one of Armstrong's neighbors called the police to report that a pickup  
 2 truck was driving recklessly. Id. ¶ 23. The police told the caller that they would not take action or  
 3 open an incident report. Id. On April 17, another one of Armstrong's neighbors discovered that the  
 4 same truck was registered to MediMarts. Id. ¶ 24. That neighbor reported to police (and to an  
 5 unknown city councilmember) that a truck registered to MediMarts was driving recklessly. Id.

6       At around 6:00 a.m. on May 14, five police officers—in one unmarked car, three marked  
 7 cars, and one helicopter—began surveilling Armstrong's residence in Morgan Hill (which is  
 8 beyond the San Jose city limits). Id. ¶ 26–27. After about an hour and a half, Armstrong left to  
 9 drive to San Jose. Id. An officer followed him in an unmarked car for about seven miles and saw  
 10 him commit several traffic violations. Id. ¶ 28–29. The officer stopped him and issued a citation  
 11 for misdemeanor reckless driving. Id. ¶ 29–30. Three other marked police cars joined the stop. Id.  
 12 ¶ 29.

13       On March 3, 2016, the same officer (with thirteen others) “again conducted a traffic  
 14 enforcement sting” targeting Armstrong. Id. ¶ 33. After pulling him over, an officer pushed him  
 15 against a vehicle “with such force that it dented the body panel. Mr. Armstrong sustained injuries  
 16 to his shoulder, arm, and knee, for which he required medical treatment.” Id. ¶ 34. The officer  
 17 arrested him for misdemeanor reckless driving. Id. ¶ 36. Police also notified the DMV that  
 18 Armstrong’s license should be suspended under California Vehicle Code § 21061.<sup>2</sup>

## 19       II. LEGAL STANDARD

### 20       A. 12(b)(6) Motion to Dismiss

21       Dismissal under Fed. R. Civ. P. 12(b)(6) “is proper only where there is no cognizable legal  
 22 theory or an absence of sufficient facts alleged to support a cognizable legal theory.” Navarro v.  
 23 Block, 250 F.3d 729, 732 (9th Cir. 2001). The complaint “must contain sufficient factual matter,  
 24 accepted as true, to ‘state a claim to relief that is plausible on its face.’ ” Ashcroft v. Iqbal, 556

---

25  
 26       <sup>2</sup> This section allows an officer to issue a notice of reexamination when a driver exhibits “serious  
 27 physical injury or illness or mental impairment or disorientation” that “presents a clear or potential  
 28 danger or risk of injury to the person or others if that person is permitted to resume operation of a  
 motor vehicle.”

1 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

2 **B. Section 1983**

3 42 U.S.C. § 1983 provides a tort remedy against “[e]very person who, under color of [state  
4 law] subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of  
5 any rights, privileges, or immunities secured by the Constitution and laws.”

6 **III. DISCUSSION**

7 Armstrong claims that Defendants (1) selectively enforced criminal laws against him in  
8 violation of the Equal Protection Clause of the Fourteenth Amendment (Compl. ¶¶ 39–47); (2)  
9 used excessive force during the March 3, 2016 traffic stop in violation of the Fourth Amendment  
10 (Compl. ¶¶ 48–55); and (3) selectively enforced criminal laws against him in retaliation for  
11 exercising his First Amendment rights to speak freely and to petition the courts for redress of  
12 grievances (Compl. ¶¶ 56–63).

13 **A. Fourteenth Amendment**

14 Armstrong argues that the City deprived him of equal protection of the laws by selectively  
15 enforcing California Vehicle Code § 23103(a)<sup>3</sup> against him. Compl. ¶¶ 39–47.

16 To prevail on an equal protection claim based on selective enforcement, “a plaintiff must  
17 demonstrate that enforcement had a discriminatory effect and the police were motivated by a  
18 discriminatory purpose.” Rosenbaum v. City & Cty. of S.F., 484 F.3d 1142, 1152 (9th Cir. 2007)  
19 (citing Wayte v. United States, 470 U.S. 598, 608 (1985)). “Enforcement may be shown through a  
20 variety of actual or threatened arrests, searches and temporary seizures, citations, and other  
21 coercive conduct by the police.” Lacey v. Maricopa Cty., 693 F.3d 896, 920 (9th Cir. 2012). The  
22 plaintiff “must show that similarly situated individuals . . . were not prosecuted.” United States v.  
23 Armstrong, 517 U.S. 456, 465 (1996). The U.S. Supreme Court has “recognized successful equal  
24 protection claims brought by a ‘class of one,’ where the plaintiff alleges that she has been  
25 intentionally treated differently from others similarly situated and that there is no rational basis for

---

27 <sup>3</sup> “A person who drives a vehicle upon a highway in willful or wanton disregard for the safety of  
28 persons or property is guilty of reckless driving.”

1 the difference in treatment.” Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

2 The City argues that Armstrong “does not identify any similarly-situated class of persons  
3 or control group, let alone facts as to how he is similarly situated to such a group and how  
4 Defendants treated him differently.” Defs.’ Mot. to Dismiss (“MTD”) at 7, Dkt. No. 15. But  
5 Armstrong alleges that during the first six months of 2016, when he was first stopped and cited,  
6 the City received more than 3,000 emergency calls reporting reckless driving, Compl. ¶ 21. The  
7 only report that led to an arrest or citation was the one involving Armstrong, and only after he was  
8 identified as the vehicle’s owner. Id. He further alleges that in March 2016, when fourteen officers  
9 orchestrated the sting that led to Armstrong’s arrest, the City’s police department announced that it  
10 was understaffed at “crisis levels.” Id. ¶ 22. According to Armstrong, the City selectively enforced  
11 traffic laws against him “as a way to bully him because of his alleged failure to pay the local  
12 [cannabis] tax and because of the continued exercise of his legal rights in court.” Id. ¶ 10.

13 Armstrong has stated a claim for an equal protection violation based on the City’s selective  
14 enforcement of traffic laws: the “similarly situated individuals” are the other reckless drivers that  
15 the City decided not to pursue, and the “discriminatory purpose” is the City’s intent to retaliate  
16 against Armstrong for his challenge to the cannabis tax.

17 The City cites several California cases for the proposition that “an equal protection  
18 violation does not arise whenever officials ‘prosecute one and not [another] for the same act.’ ”  
19 MTD at 7–8 (quoting Murgia v. Mun. Ct., 15 Cal. 3d 286, 297 (1975)). But Armstrong’s claim  
20 goes further: he argues that the City prosecuted him, and not others, because it intended to single  
21 him out. Discriminatory enforcement is actionable. See, e.g., Murgia, 15 Cal. 3d at 297 (“the equal  
22 protection guarantee . . . prohibits prosecuting officials from purposefully and intentionally  
23 singling out individuals for disparate treatment on an invidiously discriminatory basis”).

#### 24 **B. Fourth Amendment**

##### 25 **1. Excessive Force**

26 Armstrong argues that the officer’s use of force during his arrest was an unreasonable  
27 seizure of his person. Compl. ¶¶ 48–55. An officer’s use of force during an arrest violates the

1 Fourth Amendment if it was not objectively reasonable under the circumstances. Graham v.  
2 Connor, 490 U.S. 386, 396–97 (1989). Here, the parties disagree only about the amount of force  
3 that the officer used. The City calls it “a mere push” (MTD at 11; Reply at 4); Armstrong calls it a  
4 push “with such force that it dented the body panel” of a vehicle, causing “injuries to his shoulder,  
5 arm, and knee, for which he required medical treatment” (Compl. ¶ 34). On a motion to dismiss,  
6 the Court accepts the plaintiff’s facts as true, as long as they are plausible. Twombly, 550 U.S. at  
7 570. Armstrong has stated a claim for a Fourth Amendment violation based on the officer’s use of  
8 force.

9 **2. Qualified Immunity**

10 The City argues that the officer who arrested Armstrong is immune from personal liability.  
11 MTD at 11–13. Qualified immunity shields government officials from liability “unless a plaintiff  
12 pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the  
13 right was ‘clearly established’ at the time of the challenged conduct.” Ashcroft v. al-Kidd, 563  
14 U.S. 731, 735 (2011). Armstrong has met both requirements. First, he has pled facts showing that  
15 the officer’s use of force violated his Fourth Amendment right to be free from unreasonable  
16 seizure. Specifically, he alleges that the officer pushed him into a vehicle “with such force that it  
17 dented the body panel,” and that he suffered injuries that required medical attention. Compl. ¶¶  
18 34–35. He alleges that the level of force the officer used was not justified under the circumstances  
19 of the traffic stop. Id. Second, the Court agrees that the right to be free from excessive force was  
20 clearly established when the arrest occurred. Compl. ¶ 50 (alleging that the officer “acted under  
21 color of law to deprive Plaintiff of the clearly-established right to be free from the unreasonable  
22 seizure of his person”); Pl.’s Opp’n to Mot. to Dismiss at 8 (“there can be no question that the  
23 right to be free from excessive force during a misdemeanor traffic stop was clearly established in  
24 2015”). These facts, taken as true, establish that the officer is not entitled to qualified immunity.  
25 See Grant v. City of Long Beach, 315 F.3d 1081, 1088–89 (9th Cir. 2002) (on a motion to dismiss,  
26 the court must accept allegations in the complaint as true in determining whether qualified  
27 immunity applies).

**C. First Amendment**

Armstrong argues that City selectively enforced California Vehicle Code § 23103(a) against him in retaliation for exercising his rights to speak freely and to petition the courts for redress of grievances. Compl. ¶¶ 56–63.

To establish a claim of retaliation in violation of the First Amendment based on police conduct, a plaintiff must show (1) “that the officers’ conduct would chill a person of ordinary firmness from future First Amendment activity” and (2) “that the officers’ desire to chill his speech was a but-for cause of their allegedly unlawful conduct.” Ford v. City of Yakima, 706 F.3d 1188, 1193 (9th Cir. 2013).

Armstrong has met both requirements. First, his arrest had a chilling effect. Id. at 1193 (“This Court has recognized that a retaliatory police action such as an arrest or search and seizure would chill a person of ordinary firmness from engaging in future First Amendment activity.”). Whether there was probable cause for his arrest is irrelevant here. Skoog v. Cty. of Clackamas, 469 F.3d 1221, 1235 (9th Cir. 2006) (“a right exists to be free of police action for which retaliation is a but-for cause even if probable cause exists for that action”). Second, he has pled facts showing that retaliation was the but-for cause of the arrest. See, e.g., Compl. ¶¶ 16 (the City’s mayor expressed animosity towards Armstrong), 21 (out of more than 3,000 reports of reckless driving, the only report that resulted in an arrest or citation was the one involving Armstrong), 23–27 (police refused to act on a reckless driving complaint until they learned that the driver was Armstrong).

**D. Punitive Damages**

The City argues that Armstrong cannot seek punitive damages because he has not shown that Defendants intentionally or recklessly violated his constitutional rights. MTD at 17; Smith v. Wade, 461 U.S. 30, 56 (1983) (“a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant’s conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others”). The Court disagrees. Armstrong has pled facts sufficient to allege that the City and its police officers

1 intentionally committed the violations discussed above. He alleges that the City bears personal  
2 animosity towards him because of their ongoing disputes, including Armstrong's refusal to pay the  
3 cannabis tax and his challenges to the tax's validity. Compl. ¶¶ 8–16. Armstrong further alleges  
4 that, despite a crisis of understaffing, the City and its police officers conducted two sting  
5 operations targeting him (the first involving four police cars and a helicopter, and the second  
6 involving fourteen officers). Id. ¶¶ 23–38. He alleges that, out of more than 3,000 reports of  
7 reckless driving, the only report that led to an arrest or citation was the one involving Armstrong.  
8 Id. ¶ 21. These facts, taken as true for the purposes of this motion, may show that Defendants  
9 intentionally violated Armstrong's constitutional rights.

10 **IV. CONCLUSION**

11 The City's motion to dismiss is DENIED.

12 **IT IS SO ORDERED.**

13  
14 Dated: January 17, 2017

15   
16 EDWARD J. DAVILA  
17 United States District Judge

18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
Northern District of California